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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1242

LEWIS S. ROSENSTIEL, *Petitioner,*

v.

SUSAN L. ROSENSTIEL, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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REPLY BRIEF FOR PETITIONER

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Respondent's Brief in Opposition alleges three reasons why the writ should not be granted. Additionally, the Brief argues against some, but not all, of the points raised in the Petition concerning the substantive errors in the decision of the court below. Because of the nature of the Brief in Opposition, petitioner believes that in order to regain perspective it is necessary

to deal at length in this Reply with two subjects; first, respondent's position on the appropriateness of certiorari and second, respondent's confusion concerning the very basic errors of the New York Court of Appeals.

Wood v. Wood

Respondent places great reliance upon the refusal of this Court to review the judgment of the New York Court of Appeals in the case of *Wood* v. *Wood, cert. denied,* 86 S. Ct. 1197, 16 L. ed. 2d 206 (March 21, 1966). This reliance is unwarranted. First, the petitioner herein has presented at least three vital considerations which were not presented in the *Wood* Petition:

A. The "public policy" which the New York appellate courts invoked to support their decisions simply does not exist. As was so carefully pointed out in the Petition herein, the only operative and ascertainable policy in this case is statutory, and this statutory policy compels non-recognition of this Mexican decree (See p. 8, *infra,* for a discussion of this statutory policy). Further, the "policy" which allegedly *supports* the New York courts is not policy at all, but rather, a *fear* of embarrassing many New Yorkers who have been affected by similar Mexican decrees.

B. The invocation of "comity" as a basis for recognizing and enforcing this Mexican decree is wholly unavailing where the Mexican court had no jurisdiction. The contrary holding by the Court of Appeals is a serious error which the *Wood* Petition did not mention.

C. The Petition herein, in considering the relevancy of the doctrine of prospective overruling for this

case, suggested a straightforward method of correcting the dangerous precedent set by the New York court. Prospective overruling of the decision below would avoid the unseemly task of examining and overruling state policy because such a disposition of this case would not result in retroactive embarrassment—the only state "policy" which supports the decision of the lower court. Again, this consideration was not even suggested in the *Wood* Petition, and the same confusion which obtained in the New York Court of Appeals relating to possible disruption of thousands of New York marriages may well have been a key consideration in this Court's denial of certiorari in *Wood*.

The dual failure, *inter alia,* of the *Wood* Petition to clarify the state policy actually involved in this case or to suggest a remedy appropriate for this Court, renders the denial of certiorari therein quite irrelevant as a reason for denying petitioner's request for review.

The second reason why the denial of certiorari in *Wood* is irrelevant to this case is that long before *Wood* reached this Court, the earlier spouse of the respondent therein had died—rendering moot much of what was involved in that case. Third, the separate judgments of the Court of Appeals in *Wood* and in the instant case were predicated upon a single opinion. That opinion dealt almost exclusively with the facts in the *Rosenstiel* case. Thus, if the decision of the Court of Appeals is to be reviewed it is obvious that a consideration of *Rosenstiel* is much more appropriate than would be a review of *Wood*. Fourth, the Chihuahua jurisdictional statute invoked by the Mexican court as a basis for

granting the divorce at issue in *Wood* (Art. 23) was not the same statutory basis as that invoked by the Juarez court in its attempt to dissolve the Kaufman marriage at issue *here* (Art. 22, 24).[1] In the instant case Mr. Kaufman's signature on the Juarez Municipal Register (Art. 24) was recited by the Mexican court as a crucial jurisdictional fact; however, in *Wood* the recital of jurisdiction did not involve this statutory formality. Finally, the respondent in *Wood* was the spouse who actually entered Mexico; in this case the respondent never left the State of New York during the Mexican proceeding involving her marriage.

The Federal Questions

Notable by its absence is the fact that respondent did not choose to discuss the first, and the most important, federal question presented in the Petition. This question standing alone presents an adequate basis for reviewing and reversing the decision of the state court. This controlling question is whether domicile is an indispensable prerequisite to divorce jurisdiction or whether, according to the New York court, this standard—which has been consistently reiterated by this Court[2]—can be discarded in order to suit fanciful notions as to what might be embarrassing or what might be convenient for those who have sufficient means for a casual, one-day, trip to El Paso, Texas.

However, instead of discussing this question, the respondent has focused upon the due process question.

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[1] Articles 22, 23 and 24 of the Chihuahua Divorce Law are reprinted as Appendix A in the Petition, page 1a.

[2] See *Williams* v. *North Carolina*, [II] 325 U.S. 226 (1945) and other cases cited throughout the Petition.

First it is asserted that the long line of decisions by this Court which are relied upon by petitioner (Pet. p. 16) are not relevant to the instant case. See Brief, pp. 7-9. Respondent begins by ignoring the difference between jurisdiction over parties and jurisdiction over subject matter and, as a result, mistakenly concludes that the prearranged submission by Mr. and Mrs. Kaufman to the power of the Mexican court also gave that court power over the marriage relationship. With this erroneous assumption that the Mexican court did have complete jurisdiction, respondent then quite simply dismisses *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), *Riley* v. *New York Trust Co.*, 315 U.S. 343 (1941), *Griffin* v. *Griffin*, 327 U.S. 220 (1946) and the other cases cited in the Petition to the same effect, with the statement that these cases are

> "irrelevant, for in each of these cases either the party against whom the judgment was entered —service of process had not been effected, or the Court which purported to act, had no jurisdiction of the subject matter". Brief, p. 7.

In other words, respondent acknowledges that if there were any defects in the jurisdiction of the Mexican court, such as insufficient service of process or *no jurisdiction over the subject matter,* then it would be a denial of due process to enforce such a judgment against the petitioner herein. The respondent must be stopped short with the initial premise—that the Mexican court had jurisdiction over the Kaufman marriage. The petition amply shows that no such jurisdiction was ever obtained, respondent and the New York courts to the contrary notwithstanding. Given the failure of such an essential jurisdictional fact, *Pennoyer* and its progeny are indeed quite con-

trolling.[3] This Court has consistently, and without hesitation, struck down the denial of due process inherent in any recognition or enforcement of a judgment which was rendered by a court acting without jurisdiction, and it should do so again in this case.

Timeliness

First, respondent suggests that the denial of due process in this case has not been properly raised because it was not raised at trial. In making this argument respondent has demonstrated a failure to distinguish between the two kinds of cases which may present constitutional issues. The first type is that wherein the complaint, in the first instance, is founded upon a denial of a constitutional right. In such a case the constitutional issue must be presented at the earliest possible time. However, in this case the constitutional issue could not have been presented at trial because it did not exist at that time. There was no denial of due process herein until the New York appellate courts reversed the trial court and enforced this wholly void Mexican decree against the petitioner. It was at this point—and not before—that the petitioner was denied due process of law. Petitioner's arguments in the Court of Appeals, both on direct appeal and upon the motion for reargument, amply demonstrates

[3] The argument on page 9 of the Brief, based on *Beck* v. *Washington*, 369 U.S. 541 (1962), similarly misses the mark. In addition to the fact that *Beck* was decided by a vote of four to three in this Court (two Justices not participating), it was a criminal case. The argument made in the Petition (pp. 22-24) was not that due process requires all states to decide similar questions in the same way; rather, where there is a sharp dichotomy between the states on the matter of recognition and enforcement of foreign nation divorce decrees, this nation should speak with one voice and that voice should be the Supreme Court.

both the severity of the denial of due process and that the issue was raised as soon as the New York courts injected it into the case.

Second, respondent suggests that the Petition itself was filed out of time. By way of explaining this conclusion respondent indulges in another by stating that petitioner's motion for reargument and/or other relief "did not extend Petitioner's time within which to apply for a Writ of Certiorari." Brief, p. 10. This conclusion is supported by a wholly inappropriate quotation from Stern & Gressman's *Supreme Court Practice* (3rd Ed. 1962, p. 204) which deals with computation of time when there is *no* motion for reargument in the highest State Court. However, at page 205 the treatise continues:

> "A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Department of Banking* v. *Pink,* 317 U.S. 264, 266."

The motion for reargument in the New York Court of Appeals was timely. New York practice sets no definite time limit on motions for reargument; indeed, when respondent opposed the motion for reargument no mention was made in the Court of Appeals that the motion was *un*timely. It would appear that any legitimate objection to the timeliness of the motion for reargument would and should have been suggested to the Court of Appeals.[4]

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[4] The papers filed in the Court of Appeals concerning the motion for reargument are contained in the Record before this Court.

The motion for reargument was denied on February 24, 1966. The ninety days within which to file the Petition herein would expire May 24, 1966; however, the Petition was filed April 21, 1966—more than a month in advance of the last day for filing.

Morality

Respondent contends throughout the Brief in Opposition that it is immoral to allow an action for annulment where the grounds are available to only one of the parties to the marriage ceremony, such as the petitioner herein. Petitioner suggests, however, that there is no issue of morality, with respect to either party, contained in the record before this Court. Each of the three decisions by the New York courts refused to go beyond the issues bearing on divorce jurisdiction and New York policy. Since those are the issues presented by the present state of the record, petitioner respectfully suggests that they are the ones upon which this Court's attention should be focused. They remain as clear questions appropriate for this Court to review.

New York Statutory Policy

The Petition (pp. 18-20) demonstrated that the only affirmative policy bearing on this case which was to be found in New York at the time this case was decided (and at the time the Petition was filed) was statutory policy. New York statutory law compelled a rejection of this Mexican decree because it was obtained by means of an unlawful and collusive agreement to seek a divorce (contrary to Section 5-311 of the General Obligations Law) and because the decree was rendered on false grounds which would not be available in a New York court even if true. Additionally, federal law was operative to require divorce jurisdiction based

on domicile as a condition to recognition or enforcement of this foreign decree.

After the Petition was filed on April 21, 1966, the New York General Assembly, on April 27, 1966, amended the State's laws on domestic relations and general obligations. The final two substantive sections of the new law (See Reply Appendix; Sections 11 and 12) expressly state the absolute requirement of domicile for divorce jurisdiction (Section 11) and strengthen the existing prohibition against any agreement between spouses to obtain a divorce (Section 12; an addition of one paragraph to the pre-existing Section 5-311 of the General Obligations Law).

The new addition to Section 5-311, dealing with unlawful agreements to obtain a divorce, is effective immediately with the signing of the new law and it applies to all such agreements whether made prior or subsequent to the enactment. Thus it is crystal clear that the agreement made between respondent and Mr. Kaufman to obtain a Mexican divorce was void and seriously affected the validity of the Mexican decree. The domicile provision (Section 11 of the new law) becomes effective September 1, 1967 and requires domicile in the divorcing forum in order for the divorce to be recognized in New York.

These new provisions are cited and discussed here to emphasize what has already been said in the Petition (pp. 18-20)—and which has gone without comment or contradiction by respondent—that New York public policy, as it affects this case, has been gravely misunderstood and misapplied by the Court of Appeals. This public policy, as clearly reflected and now expressly stated in the New York legislation, defines domicile as

the *sine qua non* for divorce jurisdiction—precisely as this Court has maintained for the past twenty years.

There can now be no doubt but that New York policy, at the time the Court of Appeals decided this case (and most assuredly at the present time), was and is firmly rooted in the requirement of domicile for divorce jurisdiction. The plain error of the Court of Appeals in attempting to divine any other policy is now quite obvious. This policy of New York, together with this Court's long-standing rules of jurisdiction and the constitutional requirements of due process, can only be vindicated by positive action of this Court.

CONCLUSION

It is respectfully suggested that this Court should review this case and either (1) reverse, (2) reverse and remand for a determination by the Court of Appeals of what retroactive effect, if any, the reversal should have, or (3) simply remand this case to the court of Appeals for a redetermination in light of the actual public policy of the State of New York as analyzed and presented by the Petition and this Reply.

Respectfully submitted,

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